United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 13, 1994

TO : Daniel Silverman, Regional Director 524-0133-9000
Region 2 524-5029-1400
524-5029-6273

FROM : Robert E. Allen, Associate General Counsel
Division of Advice
530-6067-4033-9100

SUBJECT: Major League Baseball 530-8054-0100
Case 2-CA-27771 775-3700
775-8731

This Section 8(a)(3) and (5) case was submitted for advice as to whether the Employer unlawfully failed to make a pension contribution after expiration of the parties' collective-bargaining agreement.

FACTS

Major League Baseball ("the Employer" or "the Clubs") is comprised of 28 professional baseball clubs. The Major League Baseball Players Associations ("the Union" or "MLBPA") is the collective-bargaining representative for the Clubs' major league baseball players. Currently, the players are engaged in a strike.

1. The Agreements

The most recent collective-bargaining agreement (known as the "Basic Agreement") expired on December 31, 1993. Historically, the players' pension plan is not a part of the Basic Agreement, but rather is contained in two collectively bargained agreements: the Agreement Re: Major League Baseball Players Benefit Plan ("the Funding Agreement") and the Major League Baseball Players Benefit Plan ("the Benefit Plan").[1] The most recent Funding Agreement and Benefit Plan were enacted on March 19, 1990, and expired by their own terms on March 31, 1994.

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[1] The Funding Agreement specifically incorporates the Benefit Plan.

Section 21 of the Benefit Plan, entitled "Financing of Benefits and the Future of the Plan," provides, in pertinent part, that:

> **21.1** The cost of the plan shall be borne as provided in the Agreement of March 19, 1990 [the Funding Agreement], and the clubs shall have no additional obligations with respect thereto.
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> ...
>
> **21.6** The clubs reserve the right, at any time after the expiration of the Agreement of March 19, 1990, to discontinue contributions hereto for any period, or permanently, without any obligation or liability to make any contributions thereafter, and without any obligation or liability thereafter to the plan or to any member or beneficiary of the plan; provided, however, that the clubs shall use their best efforts under the circumstances then prevailing to discharge through their representatives on the pension committee any continuing administrative responsibilities under the plan.

Under the Funding Agreement, the Clubs were obligated to make a $7,590,000 installment to the pension fund on or before August 1 in the years 1990 through 1993, and a second installment of $47,410,000 on or before November 1 in each of those years. The timing of these August and November contributions historically derived from the significant television and radio revenues which the Clubs earned after the mid-summer All-Star game and World Series, respectively. Paragraph 5(b) of the Funding Agreement further provides, in pertinent part, that:

> Such contributions to the Trust Fund shall be subject to the following terms and conditions.
>
> (1) The contributions of the Clubs due on August 1 in any year during the term of this Agreement shall not be required to be made if the All-Star game is prevented in such year by any reason within the control of the Players Association, the players or any of them.

...

(4) The Clubs shall have no obligation with respect to contributions to the Plan except as provided in this subparagraph (b) which sets out the aggregate funding commitment of the Clubs for the period from April 1, 1990 to March 31, 1994.

In 1969, the parties first negotiated contract language reserving to the Employer the right to discontinue pension contributions after expiration of the Funding Agreement (which became Section 21 of the 1990 Benefit Plan, quoted above). During those sessions, the Clubs initially proposed not only to reserve the right to discontinue post-expiration pension contributions, but also to retain the authority to liquidate the plan in its entirety after expiration of the 1969 agreement. The parties, however, apparently never discussed the impact of the Employer's proposal to discontinue post-expiration pension contributions on its historical practice of making the contribution only if the players participate in the All-Star game and/or the World Series.

The Union rejected the Employer's proposal giving it the authority to liquidate the plan after expiration of the contract. However, the parties ultimately agreed to language similar to section 21 which has appeared in each successive contract. The Union's 1969 bargaining notes establish that at a January 10, 1969 bargaining session, then-Union executive director Marvin J. Miller and Employer representative John Gaherin held the following discussion:

Gaherin: Is this your position -- if notice auto. triggers liquidation, you need protection of unfunded liab?[2]

Miller: That is our first position. Second was interim period.

Gaherin: (Stated our second position.) Is there a third position, based on yesterday's discussion?

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[2] Abbreviations in original.

> **Miller:** Yes, but not in context of your claim of unilateral right. Clearly a minimum position -- no ability to move back further. **You have the right to elim. contrib. at end of agreement.** But -- there is no earthly reas. to give one party the unilateral right to liquidate the Plan. [Emphasis supplied.]

The discussion continued on the next day:

> **Gaherin:** Let's see if I understand. Our position -- if we exercise our right to discont. contrib. on notice, 90 days later liquidation proceedings begin. Your posit. -- you can serve notice to discont. contrib. and stop payments, but that does not auto. bring the liquidation proceedings into effect.
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> **Miller:** Also, notice having been given, rights of parties are subj. to collect. barg. -- incl. future of plan.

At a January 28, 1969 bargaining session, the following exchange occurred:

> **Gaherin:** We had a fairly "exhausting" discussion of 15.6 [Clubs' pension termination/liquidation proposal] -- as we understand your position: If we exercise 15.6 option to discont. contribs., when that is accomplished, then the resp. of the clubs to the Plan and the individs. is all over.
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> **Miller:** Yes, w/exception of obligation to bargain (whether or not you serve notice).
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> **Gaherin:** I agree.

2. Events leading up to the Current Strike

By letter to the Union dated January 25, 1994,[3] the Employer announced its intention to terminate and negotiate changes to the Basic Agreement, the Funding Agreement and the Benefit Plan. Thereafter, the parties have engaged in

[3] All dates hereafter are in 1994 unless noted otherwise.

a series of bargaining sessions which remain deadlocked over issues including wages and benefits.

Richard Ravitch, the Employer's bargaining representative, [*FOIA Exemptions 6, 7(C)and (D)*], in May 1994 he recommended to the Clubs' Executive Council that Club owners be presented with the option of exercising their "right" as set forth in Section 21 of the Benefit Plan, quoted above, to withhold the August 1 pension contribution unless the parties were under contract by that date. The Executive Council concurred in Ravitch's recommendation. Thus, during meetings held on June 7-9 Ravitch brought his recommendation to the attention of the owners and/or representatives of all the Clubs, purportedly in order to "stimulat[e] the Union to begin serious negotiations." Ravitch contends that during the ensuing debate representatives of the Clubs did not discuss the possibility of a strike.[4] The Clubs adopted Ravitch's proposal. However, the Clubs did not inform the Union of its decision at that time.

On July 12, the All-Star game was played in Pittsburgh, Pennsylvania. Under the terms of the Basic Agreement, the players have no obligation to play in the All-Star game and receive no salary for their participation.

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[4] In a position statement submitted to the Region, the Employer offered to make representatives who attended these meetings available to the Region for the taking of Board affidavits. [*FOIA Exemptions 6, 7(C)and (D)*]

[*FOIA Exemptions 6, 7(C)and (D)*.] The Employer contends that there are no minutes of these meetings or any other documentation to support the Clubs' alleged June decision to suspend pension contributions. [*FOIA Exemptions 6, 7(C)and (D)*

].

On July 21, the Employer received a letter from the pension plan administrator requesting the August 1 payment. The parties were still engaged in contract negotiations at that point. On July 28, the Union publicly announced its intention to strike on August 12 absent an agreement with the Clubs. On July 29, Ravitch responded to the plan administrator's letter by announcing the Clubs' decision "temporarily suspending contributions to the Benefit Plan pending the outcome of negotiations with the MLBPA." Ravitch sent a copy of this letter to Donald Fehr, the Union's negotiator, which Fehr received on August 1. The Employer did not inform the Union of its decision beforehand, despite a series of face-to-face meetings between Ravitch and Fehr in late July.[5]

The next bargaining session took place on August 3. Fehr reminded Ravitch that unlike other sports, baseball players receive no direct compensation under the collective-bargaining agreement for play in the All-Star game.[6] Rather, for years players have understood that the Clubs make two annual pension payments after receiving revenues from television and radio coverage of the All-Star game and the World series. Fehr paraphrased paragraph 5(b)(1) of the Funding Agreement which provides that contributions do not have to be made if the All-Star game is not played because of the players' actions. Fehr stated that the players had debated boycotting the game, but had declined to do so and he complained that the owners profited from the players' good faith participation in the All-Star game and now the Clubs will keep the money during the strike. Ravitch responded that the Funding Agreement only provided for four specific, annual payments during the life of the agreement. He maintained that the timing of

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[5] Ravitch states that he failed to give the Union advance notice of the Employer's decision because the Union had not asked and because Ravitch felt that the Union had no reason to expect the contribution absent a contract.

[6] Players chosen to play in the All-Star game receive expenses under the terms of the Basic Agreement. It is unknown whether players also receive some compensation, such as incentive payments, under the terms of their individual contracts with the Clubs.

the payments did not imply a quid pro quo, but was dictated solely by the occasions -- such as the All-Star game and the World Series -- when the Clubs received an influx of cash. Ravitch argued that if the intent of the Funding Agreement was to link the payments to actual performance in the game after expiration of the Agreement, it would say so.

Ravitch and Fehr participated in a press conference immediately following the August 3 bargaining session. According to an audio tape of the conference obtained by the Region, Ravitch was asked and responded to the following question.

> **Question:** Is the Friday miss, or the August 1st missed payment or non-payment add another wedge into these negotiations and are they taking --
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> **Ravitch:** Well, I think if the Union wishes to characterize it as an act of bad faith, but again, you know, the simple fact is, in negotiations, that employers take great risks when they enter collective-bargaining agreements and so do employees through their unions. And when strikes occur, the employer is deprived of the revenues of the game and the employees of the employer are deprived of the benefits that were accorded them when the collective-bargaining agreements were in full force.
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> And if there is no resolution of this, and I don't mean to suggest that I think there won't be, I have still every expectation and certainly every hope that this will be resolved easily and that nobody will end up being injured as a result of it. **But there are risks involved in striking, there certainly are, to both sides.** [Emphasis supplied.]

In an August 3 newspaper column, New York Times sports reporter Murray Chass gave the following account of comments made by Milwaukee Brewers owner and Acting Baseball Commissioner Bud Selig:

> ... Selig denied that the owners were using the pension payment as a weapon. "It's a decision we

> made after a lot of thought," he said by telephone from Milwaukee. "I just think it's consistent, given the framework of everything going on right now." Asked what he meant by "everything going on," Selig said, "the strike date and everything else."

According to the Employer, Selig did not recall making this specific statement, but he admitted that it was possible that he may have made a similar statement.

The players commenced a strike on August 12, which continues to date. The Employer has not made the August 1 pension contribution.[7]

3. The Events in 1985

In 1985, the Benefit Plan and Funding Agreement expired by their own terms on March 31.[8] During negotiations throughout 1984 and 1985 the Union sought a pension plan contribution of one third of the Employer's national broadcasting revenues, or approximately $60 million for each of three years. The Employer, however, made a plea of financial distress.

By the end of June 1985, the parties had not yet reached agreement on any core economic issue. According to the Union's minutes of a June 28, 1985, bargaining session Fehr told Employer representative Lee MacPhail that there was an All-Star game scheduled and, "as the [Union] understood the situation, if the game is played, under the

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[7] On September 16, the Employer proposed to lend the Benefit Plan money necessary to cover any shortfall as it related to non-player personnel, such as coaches, managers, trainers and widows of former players. Ravitch told Fehr that what the Union did with regard to active players was their concern. Currently, the Employer is lending the Plan on a monthly basis sufficient funds to cover non-striking beneficiaries and the Union is lending the corresponding amount to cover active players.

[8] The agreements contained language virtually identical to section 21.6 and paragraph 5(b).

current agreement $2.176 Million would be contributed into the pension plan." Fehr asked if it was the Employer's position that the game should be played "under the existing agreement." MacPhail responded, yes. Employer representative Lou Hoynes added that this understanding was "subject to whatever we negotiate this year."[9] MacPhail asked Fehr whether the Union will recommend that the players participate in the All-Star game. Fehr responded that the Union had not yet made a decision and will not do so until the day before the game.

On July 16, 1985, the All-Star game was held. On or about August 1, the Employer made the pension contribution. On August 6, the players struck for approximately one day; the strike settled on August 7.

The Union contends that by making the 1985 pension contribution, the Clubs acknowledged that the payment was legally required after expiration of the collective-bargaining agreements. The Employer contends that the fact that it chose to make the 1985 pension contribution even though the collective-bargaining agreements had expired does not imply that it acknowledged an obligation to make the post-expiration payment. Rather, the Clubs contend that unlike the current situation, in 1985 contract negotiations were proceeding reasonably smoothly, prompting the Clubs to make a "strategic determination" that there was more to be gained from making a post-expiration contribution than from withholding one. The Clubs further state that the Union implicitly threatened not to play the 1985 All-Star game unless the Clubs committed to making an August 1 contribution. Thus, according to the Employer's minutes of the June 28, 1985, bargaining session, Fehr told the Employer that, "If you have an offer to make, make it before the next meeting." The Employer maintains that this statement constituted an implied threat not to play the All-Star game absent movement on contractual issues.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Clubs violated Sections

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[9] As set forth above, the 1985 negotiations focused on the amount of the Employer's pension contributions.

8(a)(3) and (5) by unilaterally refusing to make a post-expiration pension contribution, and by failing to do so because the Union threatened to strike.

1. Unilateral Change

It is well-settled that payments to a bargained-for pension plan constitute a term and condition of employment even after the expiration of the collective-bargaining agreement.[10] Thus, an employer's unilateral suspension of pension payments constitutes an unlawful refusal to bargain, absent good-faith impasse, the loss of the union's majority status, or a waiver of the statutory right to bargain.[11] The Employer's contention that its conduct was privileged is based solely on a waiver theory.

The waiver of a statutory right is not lightly inferred and can be established only if it is clear and unequivocal.[12] A waiver may occur: "by express contract language, by the parties' conduct including bargaining history and past practice, or by a combination of both."[13]

A "clear and unmistakable" waiver does not exist where a contract contains internally inconsistent provisions[14] or is susceptible to conflicting interpretations.[15] For instance, in Michigan Bell the Board reversed the ALJ and

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[10] Hen House Market No. 3, 175 NLRB 596 (1969), enf'd 428 F.2d 133 (8th Cir. 1970).

[11] Cauthorne Trucking, 256 NLRB 721-22 (1981), mod. on other grounds 691 F.2d 1023 (D.C. Cir. 1982). See generally NLRB v. Katz, 369 U.S. 736, 743 (1962).

[12] Metropolitan Edison v. NLRB, 460 U.S. 693, 708 (1983).

[13] Energy Cooperative, 290 NLRB 635, 636 (1988).

[14] Postal Service, 308 NLRB 1305, 1310 (1992), enf. den. on other grounds, 18 F.3d 1089 (3rd Cir. 1994) (no waiver, where contract clause supporting waiver cannot be read apart from non-discrimination clause which constrains employer's authority).

[15] Michigan Bell Telephone Co., 306 NLRB 281, 282 (1992).

held that the employer's post-impasse implementation of a substance abuse policy did not violate Section 8(a)(5) because the zipper clause did not constitute a clear and unmistakable waiver of its right to bargain over non-contractual mandatory subjects.[16] The Board found ambiguity with respect to two portions of the zipper clause. First, it was not clear whether the use of the term "thereby" referred only to items covered during recent negotiations or, as construed by the ALJ, to items not raised during negotiations. Second, the phrase "finally conclude contract bargaining" may imply that the parties concluded bargaining only as to matters within and not outside the contract. The Board concluded that the zipper clause did not meet the "clear and unmistakable" waiver standard since, "[a]lthough it may not be clear that the foregoing is the correct interpretation of the parties' intent, neither is it clear that the interpretation given this language by the judge is correct."[17]

Absent unequivocal contract language, bargaining history or past practice may establish a waiver, but only if the subject was "fully discussed and consciously explored during negotiations and the union [...] consciously yielded or clearly and unmistakably waived its interest in the matter."[18] In United Technologies Corp.,[19]

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[16] In Michigan Bell, supra, the parties' zipper clause provided:

> This Agreement is agreed upon in final settlement of all demands and proposals made by either party during recent negotiations, and the parties intend thereby to finally conclude contract bargaining throughout its duration. (Emphasis added.)

[17] Ibid.

[18] Johnson-Bateman Co., 295 NLRB 180, 184 (1989). A contract need not expressly contain a waiver if prior negotiations establish a conscious yielding. General Electric Co., 296 NLRB 844 (1989), enf'd 915 F.2d 738 (D.C. Cir. 1990), reh'g denied.

the Board affirmed the ALJ and held that a zipper clause did not act as a waiver so as to privilege the employer's unilateral imposition of a new rule requiring the wearing of uniforms by its employees.[20] The ALJ initially noted that the zipper clause fell short of the kind of "unequivocal" language required to establish a waiver. Moreover, the ALJ further rejected any reliance on bargaining history to establish a waiver, noting that "the parties simply never addressed the issue of uniforms in their negotiations or contract."[21]

However, the Board has dismissed Section 8(a)(5) allegations where bargaining history supports unequivocal contractual language to establish that the union waived its right to bargain over an employer's unilateral changes. For example, in Columbus Electric Co.,[22] the Board found that the employer did not violate Section 8(a)(5) by discontinuing non-contractual Christmas bonuses because a zipper clause clearly and unmistakably privileged this conduct. An examination of the prior bargaining history and contract language revealed that the parties clearly agreed that the provisions of the collective-bargaining agreement would supersede all prior agreements and understandings, and that the collective-bargaining agreement would govern the parties' "entire relationship"

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[19] 286 NLRB 693, 694-95 (1987).

[20] The zipper clause provided, in pertinent part, that the parties agree to "suspend meetings in collective bargaining negotiations during the life of this agreement with respect to any further demands, including pensions or insurance for any employees or with respect to any questions of wages, hours, or working conditions ...." Id. at 694.

[21] Id. at 695. See also Angelus Block Co., Inc., 250 NLRB 868, 877 (1980) (broad zipper clause does not constitute waiver of right to bargain over unilateral classifications of new equipment and wage rates since parties never specifically discussed new classifications during bargaining over zipper clause).

[22] 270 NLRB 686, 687 (1984), aff'd sub nom. Electrical Workers IBEW Local 1466 v. NLRB, 795 F.2d 150 (D.C. Cir. 1986).

and be the "sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise."[23] The parties' understanding was underscored by the employer's response to interrogatories by the union concerning the zipper clause language in which it stated that the intention of the zipper clause was to "wipe the slate clean before the new contract goes into effect."[24]

In TCI of New York,[25] the Board also found a waiver where the parties' contract contained the following provision:

> This Agreement fully and completely incorporates all such understandings and agreements and supersedes all prior agreements, understandings and past practices, oral or written, express or implied.

The Board found that the language above is "both broad and explicit, and contains no ambiguity to indicate equivocal intentions on the part of either party."[26] Thus, by "accepting such a strongly worded proposal" the Board held that the Union knowingly agreed to have the current agreement supersede all past practices, including the provision of a non-contractual Christmas bonuses. Although the parties had not discussed during bargaining the impact of the zipper clause on the Christmas bonus, the Board concluded that "in light of the clarity of the Respondent's proposed language," the Union's failure to seek clarification of the scope of the zipper clause does not vitiate the plain language therein.[27]

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[23] Id. at 686-687.

[24] Id. at 687.

[25] 301 NLRB 822, 823 (1991).

[26] Id. at 825.

[27] Id. at 825 and n.25.

Here, it is arguable that the contract, read as a whole, is ambiguous as to whether the Employer may unilaterally suspend pension contributions after expiration of the collective-bargaining agreements. Section 21, standing alone, constitutes a clear grant of authority to the Employer to discontinue post-expiration pension contributions. However, paragraph 5(b)(1) specifically establishes that participation in the All-Star game constitutes a quid pro quo for receipt of the pension money. That clause cannot be read apart from the rest of the agreement. Thus, we conclude that a triable issue exists as to whether the contract, in its entirety, waives the Union's right to bargain over a pension contribution after the contract expires where the players participate in the All-Star game.

Bargaining history similarly is insufficient to establish the parties' unequivocal intent to waive statutory rights. During the 1969 negotiations, neither party discussed the impact of the Employer's proposal to discontinue pension contributions on the otherwise settled policy of linking a pension payment to playing the All-Star game. Rather, the parties merely discussed the Employer's proposal in general terms, without application to the instant situation. As such, the bargaining history is insufficient to support the broad reading of section 21 proposed by the Clubs.[28] Moreover, the past practice in 1985 -- the only occurrence similar to the instant situation -- establishes that the Employer recognized its obligation to make the contribution even though the contracts had expired.[29]

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[28] In light of the apparent inconsistencies between section 21 and paragraph 5(b)(1), we would distinguish TCI of New York and Columbus Electric in which the Board found waivers based on unequivocal contract language.

[29] The parties agreed in 1985 that the game should be played "under the existing agreement." The Employer contends that the parties thereby specifically agreed to proceed as if the contract were still in effect, i.e., that the Employer would forego its option under section 21 of refusing to make a post-expiration payment. However, a more persuasive reading of the 1985 bargaining history establishes that "under the existing agreement," refers to the contractual

Accordingly, we conclude that complaint should issue alleging that the Employer's unilateral suspension of the August 1 pension contribution violated Section 8(a)(5).[30]

2. Discrimination

In Texaco, Inc.,[31] the Board articulated the analysis to be used in determining whether an employer violates the Act by refusing a request for employee benefits during a strike. The General Counsel must initially make a prima facie showing of some adverse effect of the denial of benefits on employee rights. This burden is met by demonstrating that: (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of the strike. Once the General Counsel makes this showing, the burden shifts to the employer to come forward with evidence of a legitimate and substantial business justification for its

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amount of the contribution and not the Employer's obligation to pay. Thus, prior to the agreement to play the All-Star game "under the existing agreement," the parties agreed that "if the game is played, under the current agreement $2.176 Million would be contributed into the pension plan." Employer representative Lou Hoynes added that this understanding was "subject to whatever we negotiate this year." The amount of the pension contribution was one of the major outstanding issues during the 1985 negotiations.

[30] We note that under NCR Corp., 271 NLRB 1212 (1984), the Board does not enter a dispute that is "solely of contract interpretation" in order to choose between two substantial contractual claims. We further note that the Board has never reconciled NCR with the waiver line of cases set forth above. However, the Board has distinguished NCR where the issue was not solely one of contractual interpretation, but concerned instead an employer's refusal to make payments that had previously accrued in violation of Section 8(a)(5). See Flatbush Manor Care Center, 315 NLRB No. 8 (September 29, 1994). We would similarly distinguish NCR on those grounds.

[31] 285 NLRB 241, 245-46 (1987).

denial of benefits. If the employer establishes a business justification, the Board may nevertheless find a violation if the employer's conduct is motivated by anti-union animus.[32]

The evidence is sufficient to establish a prima facie case. Under the initial stage of the burden-shifting Texaco analysis, the General Counsel must establish "a reasonable and arguably correct contract interpretation"[33] supporting the claim that the benefit was due and payable and therefore accrued on the date the Employer withheld payment. Paragraph 5(b) of the Funding Agreement provides that "in any year during the term of this agreement" a pension payment is due on August 1 unless the All-Star game is canceled because of the players' actions. On July 12, the players participated in the 1994 All-Star game as scheduled. Nevertheless, on July 29 the Clubs rejected the pension plan administrator's request for payment. Notwithstanding the fact that the agreement had expired and that paragraph 5(b) by its terms applies only during the life of the agreement, there is a reasonable and arguably correct contractual claim that the pension payment was accrued on the grounds that it was the quid pro quo for the All-Star game.

Secondly, there is sufficient evidence that the Clubs apparently withheld payment because of the strike announcement. The timing is evident. The Clubs were aware ab initio of the August 1 payment deadline. Nevertheless, Ravitch waited until July 29 to announce the Employer's decision to withhold payment, one day after the Union issued its July 28 strike deadline. Even then the Employer never utilized the withholding as a tool to "stimulat[e] the Union to begin serious negotiations." Rather than threatening the Union with the suspension in order to leverage concessions at the bargaining table -- which the Employer told the Region was the purpose behind its decision -- the Employer merely announced its decision without notice.

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[32] See, e.g., NLRB v. Great Dane Trailers, 388 U.S. 26 (1967).

[33] Bil-Mar Foods, 286 NLRB 786, 788 (1987).

Furthermore, at the August 3 press conference, Ravitch linked the Employer's decision to withhold the pension contribution directly to the Union's strike announcement. Thus, he responded to a question about the missed payment by stating that "there are risks involved in striking, there certainly are, to both sides." Acting Baseball Commission Selig reiterated this linkage when he stated to the press that the missed payment is "consistent" with the Union's announcement of a strike. We note that the Employer contends that it decided in early June to withhold payment to the pension plan if the parties had not agreed to a contract by August 1, and that this purported decision pre-dated the Union's July 28 strike announcement. However, implementation of that decision admittedly was contingent on the outcome of contract negotiations. Thus, contrary to the Employer's position statement [*FOIA Exemptions 6, 7(C)and (D)*], the Employer's June "decision" to withhold payment apparently was not finalized until July 29, the date the Employer notified the Plan and the Union of its decision and one day after the Union made its strike announcement.

The Employer, however, has satisfied its burden under Texaco of establishing a legitimate and substantial business justification for refusing payment. Such a showing may be made by reliance on a "nondiscriminatory, reasonable and arguably correct" contract interpretation.[34] As set forth above,[35] section 21 of the Benefit Plan -- standing alone -- arguably affords the Employer the right to discontinue pension contributions after expiration of the collective-bargaining agreement. The Employer relied on the broad language of this clause both in its July 29 letter to the pension administrator and during the August 3 meeting with the Union. Thus, the Clubs' position was reasonable and arguably correct.

Nevertheless, the totality of the facts established in the investigation raises a triable issue that the Employer withheld the pension contribution because the Union

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[34] Bil-Mar Foods, 286 NLRB at 788.

[35] See supra at p. 14.

announced an impending strike. As set forth above at p. 16, the timing of Employer's announcement, coming the day after the Union's strike announcement, as well as the statements by Ravitch and Selig, belie the Employer's contention that it withheld the pension contribution solely because the parties were not under contract. In so concluding, we note that even assuming the Clubs made the decision to withhold the contribution at its June meetings (well before the strike announcement), that decision was not finalized at that time, but rather was conditioned on a subsequent event, i.e., the result of ongoing contract negotiations. Thus, the Employer arguably made the final decision only after the Union issued its strike announcement, and in reaction to it. Accordingly, complaint should issue in order to place the Section 8(a)(3) allegation before the Board.

R.E.A.